97-84003-28

Case, Frederick T.

"The agent-authority of agents and officers...

[New York?]

c1916

97-84003-28
MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD

308
Z
Box 24
Case, Frederick T
"The agent - authority of agents and officers of company;" an address... on December 14th, 1915.
[New York?] Insurance society of New York, c1916.
15 p. 23cm.

69789

ONLY C.L.

RESTRICTIONS ON USE: *Reproductions may not be made without permission from Columbia University Libraries.*

TECHNICAL MICROFORM DATA

FILM SIZE: 35mm REDUCTION RATIO: 11:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 1-14-97 INITIALS: PB.

TRACKING # : 20422

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.

BIBLIOGRAPHIC IRREGULARITIES

MAIN ENTRY: Case, Frederick T.

"The agent-authority of agents and officers of company;"

Bibliographic Irregularities in the Original Document:

List all volumes and pages affected; include name of institution if filming borrowed text.

_____ Page(s) missing/not available: _____

_____ Volume(s) missing/not available: _____

_____ Illegible and/or damaged page(s): _____

_____ Page(s) or volume(s) misnumbered: _____

_____ Bound out of sequence: _____

_____ Page(s) or volume(s) filmed from copy borrowed from: _____

X Other: pagination begins with page [3]

_____ Inserted material: _____

TRACKING#: MSH20422

Box 1

30A
2
Box 24

"The Agent--Authority of Agents and Officers of Company"

AN ADDRESS

Delivered before the One Hundred and Twentieth Meeting

OF

The Insurance Society of New York

ON

December 14th, 1915

BY

Mr. Frederick T. Case

Copyrighted, 1916, The Insurance Society of New York

Mn. 22, 1916 - B13.

The subject for discussion at this evening's meeting is "the agent—powers of agent and officers of the company."

You will have noticed in your experience with fire insurance problems that questions of agency pervade nearly every difficulty that comes up. I will venture to say that there has hardly been a single address before you at these meetings that has not touched upon agency in one way or another. The reason for this is the obvious one that practically all insurance throughout the world is done solely by and through agents.

We are not permitted to-night to range freely and at will over the whole subject of agency,—if we wished to cover the whole subject, a year's course of addresses would hardly be sufficient. We could spend some time on the interesting questions that arise where a man acts as agent for both the company and the assured, as in the case of the ordinary broker. We could discuss the statutory provisions relating to registration and taxation of agents, and so we could continue almost without limit. But your conservative and wise committee has limited me to that part of the subject which is suggested by two clauses in the New York Standard Form Fire Insurance Policy.

The first of those clauses (lines 47-48) provides that:

> "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company." (1)

The second of those provisions (lines 113-116) says that:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, *and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon and added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any shall be written upon or attached hereto,* nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." (2)

(1) Elliott on Insurance says in a Note at page 199: "This provision is found in the Standard policies of N. Y., N. J., Conn., R. I., La., Iowa, N. D., S. D., and N. C. The provision is not found in the Standard policies of Maine, N. H., Wisc., Mass., and Minn. The Mich. policy provides that: 'In any matter relating to the procuring of this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.' "

(2) Richards on Insurance (3rd Ed.) in a Note on page 206 says that this clause is found in nearly all of the Standard Form policies at the date of this writing (1907) except Maine, New Hampshire, Massachusetts, Iowa and South Dakota.

A careful reading of the policy will show that these two sections are the only ones which touch directly and specifically upon agency. And while they seem fairly simple and at first sight unobjectionable, they raise fundamental questions that have come before the courts frequently and which have resulted, of necessity, in the court's practically wiping out those clauses from the policy. I do not know upon what authority or what advice of eminent counsel these clauses were inserted in the policy, but I have no hesitancy in saying that it was inevitable from the outset that they must fail to stand the test when brought before the courts.

But before plunging into the midst of our subject or jumping to our conclusions, let us look at one or two preliminary points that are most important. First of all what is an agent? You can find the word agent defined in any dictionary, (3) and in any law encyclopædia, (4) and then you can read thousands of legal decisions, each of which will give up pages on pages determining whether one particular person is or is not an agent. Without going through those decisions or definitions or any of them, we most of us will have a definite idea of who is an agent in the insurance business. We will usually picture him to ourselves as a local agent who solicits and accepts business, and who is entrusted with policy forms which he fills in, countersigns and issues to the applicants for insurance; or perhaps the word agent calls up to our mind the Special Agent, whom the company sends out with greater or less authority to appoint and supervise the local agents and their acceptance of risks; or again perhaps the word agent will suggest the adjuster whose most thoughtful action or most careful inaction is so often urged as a waiver or an estoppel.

In a legal or dictionary sense, however, the term is much broader. If we were to try to define the word agent, we would probably say that an agent is any person who acts under proper authority for another person. Such a definition is not complete nor quite accurate, but for our purposes it is probably sufficient to say that in the insurance sense an agent is any person who represents an insurance company with the latter's authority. It makes no difference what name or title such agent assumes or is given by the company, it makes no difference whether he be called local

(3) Century Dictionary "Agent—a person acting on behalf of another, called his principal; a representative; a deputy, factor, substitute, or attorney."

(4) 31 Cyc. 1189 "Agency in its broadest sense includes every relation in which one person acts for or represents another by his authority."

agent, United States Manager, (5) President, Secretary, adjuster, or even broker—if he represents the company and is authorized to do so he is the agent of the company, and the company is bound by his acts done within his authority. Thus we come back to one of our first propositions, namely, that agency pervades the whole insurance business from beginning to end. Practically all insurance business is done by corporations or associations and it is fundamental that they can act only through human agencies. (6) A corporation is an artificial entity created by law, and it can act only through human hands. Thus every act of an insurance company must be done through an agent of higher or lower degree—in many instances the agent is the President or other high official of the company, while in other instances the agent may be the less exalted but also necessary counter man or even the re-insurance placer. One is an agent as much as another and each will bind his company by all that he does within the real or apparent scope of his employment.

The ordinary way of making a man an agent is by agreement between him and the company, whereby he is appointed to represent the company. Such an agency contract, like any other agreement, may be in writing or oral and may take any form that suits the parties. (7) It will sometimes be a formal contract drawn by a lawyer, but more often it will be a mere exchange of letters or a mere understanding reached in the course of a conversation. There is no provision of law in any jurisdiction so far as I know which would require a contract of agency to be in writing. It has never been placed in the category of contracts for the sale of real estate, or contracts for the sale of merchandise worth more than $50, and certain other contracts all of which are unenforcible unless evidenced by some written memorandum signed by the parties. In the case of the local insurance agent, the company usually but not always issues a written certificate of authority which the agent has framed and hung in his office. That certificate contains no lengthy statement of powers, nor does it contain any fine print conditions

(5) See ADAMSON v. SCHREINER, N. Y. Law Journal for December 9, 1915, page 914.

(6) Richards on Insurance, 3rd Ed., page 189; Morowetz on Corporations, 2nd Ed., Section 575, says: "Corporations almost invariably act through agents. There are few acts which a corporation aggregate can possibly perform without the intervention of an agency of some kind. It becomes necessary, therefore, in almost every instance in which the legal effect of a corporate act is in question, to consider the application of the doctrine of the law of agency."

(7) For instance, in a New Jersey case the relation of agency was held to be created merely by a nod of the head. THOMAS v. SPENCER (1899) 42 Atl. 275.

limiting the authority. It simply says that John Smith of this or that town is duly authorized to represent the company and write and issue its policies of insurance. There may be some understanding through special instructions or correspondence that the company has a prohibited list, or that it will limit its lines very strictly on certain named hazards. Such special instructions and understandings will be absolutely binding between the company and the agent, and any violation of the limitations of his authority will render the agent absolutely liable to the company for any resulting damages. (8) But these special limitations cannot be held effective as against third parties who never heard of them. (9) An easy example of this proposition is readily found in automobile insurance. The companies usually refuse to insure automobiles after they have arrived at a fixed and certain degree of antiquity. Antiques of all sorts are very difficult of valuation, and aged automobiles moreover might well be classed as extra hazardous—they seem peculiarly susceptible to fire on lonely roads where there are no unnecessary witnesses. But suppose an agent who has the strictest instructions on this point, violates the instructions, and insures a 1905 Atlas that is seriously affected in both lungs, and has a complication of internal troubles. The company may have a right of action against the agent for violating his instructions, but the policy will be absolutely binding upon the company unless it could be shown that the assured knew that the agent had no right to issue the policy on a car of that age. Proof of such knowledge on the part of the assured would generally be impossible. The point which I wish to make, is that the agent under such general authority has wide and almost unlimited power to bind his company, excepting in the rare case where the assured could be shown to have knowledge of some limitation upon the agent's general powers.

Two other ways of creating the relation of agency are by estoppel and by ratification. If we were to speak more precisely we would say that estoppel and ratification do not create agency but merely create the same obligations and liabilities as if there had

(8) It was said in LIGHTBODY v. NO. AM. INS. CO., 23 Wend. 18, "Although he (the agent) must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons dealing with him in good faith are concerned."

(9) In RUGGLES v. AM. CENT. INS. CO. (1889) 114, N. Y. 415, an agent was authorized to write policies but was instructed not to bind any Special Risks—HELD: The agent could and did bind the company on plaintiff's special risk, the plaintiff having no knowledge of the restrictive instructions. See also WALSH v. HARTFORD FIRE INS. CO., 59 N. Y. 171.

been a real agency. An example or two will show what I mean. Suppose John Smith of Syracuse had been your agent, but owing to the high cost of living and an expensive family he has gotten so far behind with his balances that you terminate the agency. Ordinarily you do not advertise the fact in the local papers, and perhaps you do not take down his signs. Mr. Assured comes along and still sees your sign in the agent's office and so tells the agent to renew an expiring policy in your company. The agent agrees, and receives the premium, and perhaps even writes up the policy on some old form that he did not return to the company. Of course, I understand perfectly that the companies always try to avoid this sort of thing by taking up the supplies and by taking back their signs and certificates of authority. But I know also that the companies do not always fully succeed in this effort. In any such case it would be manifestly unfair to allow the company to sit back and say that man was not their agent when he wrote the policy. The company through design or neglect permitted him to hold himself out as its agent, and the assured relied upon his apparent authority. He was not the agent of the company in writing that policy, but the company will be bound by his acts because he was permitted to act as though he were duly authorized in that regard. Such is an example what we know as agency by estoppel.

Now suppose this discharged agent sends in to the company a line that is quite attractive and the company in its eagerness for business accepts the line and the premium that goes with it. In that case the agent has no authority to accept the business, but the company by confirming his action and receiving the premium thereby ratifies his act and becomes bound by it. Still he was not the agent of the company, but the company becomes obligated by its ratification to the same extent and in the same manner as if he had been acting under an original authority.

However the agency may arise, whether by direct understanding between the company and agent, or by estoppel, or by ratification, the result is the same, namely: that the company is bound by the acts of the agent that are done within the scope of his authority or within its apparent scope. Thus it becomes evident that the companies are to a very remarkable degree at the mercy of their local agents, and their adjusters and their other representative. The local agent may say to the assured your chattel mortgages, or your barrels of gasoline will not make any difference with your insurance. The adjuster can readily

say never mind about a proof of loss, I see what you have and I will tell the company's loss department all about it. It was undoubtedly for the purpose of avoiding the innumerable difficulties in which the agents may involve the companies, that the framers of the New York Standard Form Policy inserted the two clauses as to agency. They were not new ideas but were found in similar, if not an identical, form in other policies that were then in use.

The first of these clauses was that "in any matter relating to this insurance no person unless duly authorized in writing shall be deemed an agent of this company." It is hard for us to see exactly what the framers of the policy had in mind when they used that clause. They must have known perfectly well that there are constantly a great number of agents of the insurance companies who have no written authority. Recently I had occasion to sue a local agent for an over-due balance. When I came to prove the agency in court I found that by peculiar chance no written commission had ever been issued to him. He had been acting as agent for the company, and had done a large volume of business for them for something like eight years or more. Unquestionably he had been the company's agent, and he had issued and signed thousands of policies containing this clause that no one should be deemed an agent of the company unless authorized in writing. And manifectly it would be grossly unfair and impossible for the company to deny liability on any of those policies on the ground that the agent who wrote them had no written certificate of authority. (10) If this clause were held to be strictly binding as between the insured and the company, we could deny liability under every policy written by that agent, simply and solely because he never received a written authorization to represent the company. If that clause could be invoked literally, the companies might do well to appoint every agent orally and then they could recognize his authority in all honest and unobjectionable losses, and deny his authority in the fraudulent cases. (11)

This clause and similar clauses have come before the courts on numerous occasions and it has been held always that a man is or is not an agent without regard to any clauses or provisions

(10) See McELROY v. BRITISH AMERICAN ASSN. CO. (1899) 94 Fed. 990.

(11) Elliott on Insurance at page 199 says: "Any other rule would permit an insurance company to relieve itself from all responsibility for the mistakes or misconduct of its agents, by the simple device of sending them out without written authorization.'

stated in the contract. (12) Thus if you have had a Mr. Smith as your local agent in Syracuse for the past ten years, you cannot unmake or disaffirm such agency merely by a clause in the policies which he writes as your agent. If it is true that Mr. Smith is your agent, it does not become untrue merely by the insertion of a clause to the contrary in the policies. This same idea is expressed by one high authority on insurance law where he says in effect that these provisions in the policies are binding if not untrue (13)—undoubtedly he would agree that if the clause is untrue then it is not of any effect.

This provision was probably put into the policy primarily to save the companies from liabilities for acts and statements of the brokers. Many of us have had occasion to learn why so many property owners regard the broker as the agent for the company. First of all he is paid by the company. The rate of premium is fixed by the companies and the assured pays only that premium without giving any compensation to the broker for his work. The assured very likely does not know whether the broker is a salaried man, or on commission, or on both salary and commission. But he does know that the broker looks solely to the company for his pay.

Then too the broker delivers the policy and collects the premium. He comes into the assured's place of business, solicits the business, and having obtained the line he says to the assured, "consider yourself insured from this moment,—I will bring the policy as soon as I can have it written up." A few days later he brings around the policy and collects the premium. If the broker had been a salaried solicitor of the insurance company, his actions and his statements would not have been different. Moreover, the company usually has a running account with the broker, giving him sixty or ninety days credit for payment of premiums, charging his account with return premiums. They have a regular course of business whereby the policy is handed to the broker for delivery to the assured, and the broker is expected to collect the premium from the assured and then within the sixty or ninety days he is supposed to remit to the company,

(12) May on Insurance (4th Ed.) Section 144 G, at page 286 says: "It makes no difference that the policy declares the agent to be the agent of the assured, not of the company. For whom a person is acting is a matter of law on the facts of every case. The application precedes the policy, and to hold that a provision in the aftercoming policy unknown to the assured at the time of application could turn the insurance agent into his agent, when he thought all the time he was dealing with him and accepting his advice as agent of the company, would be an outrage."

(13) Richards on Insurance (3rd Ed.) page 193.

less commissions and subject to other proper credits and allowances that may have accrued.

When these facts have been called to the attention of the courts they have held that under such a course of dealing the broker is the agent of the company at least for the purpose of delivering the policy and collecting the premium—and this has been held regardless of the policy provisions that no one is to be deemed an agent of the company unless duly authorized in writing.

Thus in one case that has come to my attention the company sued the assured for the premiums upon his policies and he defended on the ground that he had already paid the premiums to the broker. To this the company replied that they were not bound by his payment to the broker because the broker was not an agent for the company. But the court held that as the business was done the broker was the agent for the company, at least for the purpose of delivering the policy and collecting the premium. He held no authority in writing from the company but he was held to be the company's agent in spite of the policy provision which we are now considering. (14)

In another case the insurance company had endeavored to cancel a policy for non-payment of the premium. A little later a fire occurred. When the assured sued on the policy the company defended on the ground that the policy had been cancelled for non-payment of premiums. The assured replied that there had been no effective cancellation because there had been no return of the unearned premium. She showed that she had paid the premium to the broker and that the cancellation notice was not accompanied by any tender of the return premium. The court held in this case as in the other one, that the broker was the agent for the company for the purpose of collecting the premium so that a payment to him was in effect a payment to the company, and that consequently there could be no cancellation without a return of the unearned premium. This was so determined in spite of the fact that the broker held no written authorization from the company and in spite of the fact that the policy contained the clause that no one should be deemed an agent of the company unless authorized in writing. (15)

The ground of decision in these cases is usually the simple

(14) GLOBE & RUTGERS FIRE INS. CO. v. ROBBINS & MYERS (1904) 43 Misc. 65; Affirmed on appeal, 109 App. Div. 530.

(15) BINI v. SMITH (1899) 36 App. Div. 463.

one that you cannot alter an established fact merely by a clause in the policy. And that is the correct ground, for if you have by word or act authorized a man to represent you as your agent you cannot effectively deny that fact even by a clause in the Statutory form of insurance policy. But at least one decision falls back upon that frequent refuge of the weakminded—*waiver*. Where a court cannot think of any other ground of holding in favor of an assured and against a company, they say that the company has in some way waived its defense. Most any act or omission to act can be a waiver. If a company receives and retains an unsworn and unsigned inventory of a man's loss it may be held to have waived the service of formal sworn and detailed proof of loss. (16) If a company puts into a policy the ordinary 80 per cent. coinsurance clause, it has thereby waived the prohibition against other insurance. (17) And so at least one court held that this provision of the policy that no one be deemed the agent of the company unless authorized in writing could be and was waived by the company whenever the company appointed an agent in any other manner than by written authorization.

This doctrine of waiver has been extended and developed without much limit in recent years as was doubtless pointed out in the recent address before you upon that subject. But waivers must have been well known to the framers of the policy and they tried to clear up the difficulty by inserting the second clause that I have quoted already and which provides that all waivers must be in writing endorsed on the policy. But unfortunately the courts have held that this provision, like all others, can be waived, and that it can be waived orally or merely by actions without spoken words. (18) In fact the law may be stated broadly that an insurance company, or an individual for that matter, cannot by any conceivable form of condition or proviso give up or yield the right to waive any condition of the contract. (19) And

(16) See GLAZER v. HOME INS. CO. (1912) 190 N. Y. 6.

(17) POOL v. MILWAUKEE MECHANICS (1895) 91 Wisc. 530; NESTLER v. GERMANIA FIRE (1904) 44 Misc. (N. Y.) 97, affirmed 91 N. Y. Supp. 23. In the latter case it is said that the use of the 80% co-insurance clause permits other insurance only to the extent of the 80% therein mentioned. This limitation on the extent of the waiver does not seem to us proper. We believe that the only possible position both legally and practically is either that the prohibition against other insurance is wholly waived or else that it is not waived at all.

(18) A few very recent cases in point are: NICHOLS v. PRUDENTIAL, 170 Mo. App. 437; BANK OF ANDERSON v. HOME INS. CO. (Cal. App. 1910) 111 Pac. 507; SOUTHERN STATES FIRE INS. CO. v. VANN (1915 Fla.) 68 So. 647; HOME INS. CO. v. WILSON (1915 Ark.) 176 S. W. 688; L. L. & G. v. GARGILL (1915 Ark.) 145 Pac. 1134.

(19) MacGillivray on Insurance page 916.

this must be true. It would be intolerable if the law were to say that a contract once made could not be voluntarily modified by consent of both parties.

Suppose you rent an apartment and in the lease you provide that your landlord must do certain painting. Then you find that the paint is not so necessary as you thought so you tell the landlord to forget it, never mind it, that you waive the provision as to painting. You would be indeed surprised and shocked at any rule of law which would step in and say you cannot waive your contract provision, and having contracted for painting you must submit to it even although both you and the landlord would prefer to modify the contract in this particular.

Now what is sensible as to one condition is equally sensible as to another. If a company can waive a gasoline forfeiture, it can equally well waive the provision that changes in the contract must be in writing endorsed on the policy. There are a great quantity of court decisions upon this point, and they are found in nearly every State in the Union. They all seem to be agreed upon the point of law that the company through its duly authorized agents may waive this clause just as easily and surely as they can waive other clauses of the policy. Mr. George Richards in his well known and excellent work on insurance, takes up many pages in what might well be treated as a brief for the insurance companies in support of a strict construction of this clause of the policy. He urges that it is perfectly proper for the companies to provide the manner of making waivers, namely, by written endorsements on the policies, and he feels that the courts should give strict effect to such a clause. In one decision cited by Mr. Richards it is stated that the decisions are in hopeless conflict, some deciding that waivers must be in writing and others deciding exactly the other way. And then again it is said that some decisions make a distinction between those cases where the alleged forfeiture to be waived had occurred before the issuance of the policy and those in which it occurred afterwards. (20)

Personally, I cannot see any conflict between the cases in so far as they lay down any legal doctrine. They all agree that this clause as to the mode of making waivers may itself be waived by any person who has sufficient authority for that purpose. With that point of law in mind they examine the particular facts in each case and then come to a conclusion as to whether the particular agent in question had sufficient authority to make

(20) Richards on Insurance (3rd Ed.) pages 195 et seq. and cases cited therein.

the waiver. Different agents will have different degrees of authority and that is what gives rise to the apparent difference in the conclusions of the courts.

Moreover this easy way of getting rid of requirements that waivers be in writing is not confined to fire insurance policies. The same rule is seen in written leases. Every one of you who has a lease on office or home will probably find a fine print condition saying that you cannot sublet without the written consent of the landlord. In spite of this express provision of the lease an oral consent over the telephone is sufficient to permit a subletting. If the landlord gives his consent orally it will be deemed that he has waived the requirement that the permission be in writing. (21)

To hold any differently would be to make the written contract an instrument of oppression. An example of the way this thing works out came to my attention last winter. A retail clothing merchant in Passaic had a fire which looked rather suspicious. Upon investigation I found that the building where his store was located had been condemned by the Board of Health and was being re-constructed and re-built piecemeal. Half of the building had been torn down and partly re-built when the fire came. The local agent who wrote the policy passed the place of business several times each day and knew well all about the work, but he never endorsed any permit on the policy and he did not make any effort to cancel the policy. About a week before the fire the regular inspector of the company looked over the place and reported back to the company advising that assured was shortly to move to new store, and advising that the risk be continued uncancelled so as to hold the line after the removal to a better building. I think you will all agree with me that it would have been a gross injustice for any company or any court to say that the insurance was forfeited under those circumstances simply because the company and the assured both thought it unnecessary to endorse the policy with written waivers and consents to the re-building operations.

Similarly where the assured goes to the local agent who issued the policy and tells him that the premises are vacant and unoccupied and the agent assures him that the insurance is still in force and that the company takes no notice of the clause against vacancy. It would not be fair dealing to hold that the

(21) WEISBROD v. DEMBOWSKY. 25 Misc. (N. Y.) 485.

policy holder who had relied upon such assurances of the regular agent of the company should lose his insurance merely because he and the agent had not thought it necessary to reduce the understanding to writing and attach it to the policy.

And so we could go through case after case where the insurance company through its proper representative has by act or words waived conditions without endorsing such waiver on the policy. Wherever that occurs it would be grossly unjust and highly improper to allow the company to hide behind the fact that the waiver was not in writing on the policies. I feel no hesitancy in saying to you that the courts and juries are going to do justice in such cases and are going to refuse to give effect to the strict terms of the condition requiring waivers to be in writing. They may base the decisions on some doctrine of waiver or may be they will call the legal theory by the name of estoppel, or perhaps they will find some new legal phraseology to fit it. Under whatever name it goes the doctrine will amount to this: that where a man has in fact and in truth been appointed an agent without written authorization, the courts will hold that he is such agent in spite of any policy provision to the contrary; and further, wherever the company has in fact and in truth waived a defense the court will so hold in spite of any policy provisions to the contrary. There will still be a question of fact to decide in each case—it will still be necessary to decide whether the company's representative did actually make the waiver, and whether he was clothed with sufficient authority to make such a waiver. Such question of fact must depend upon all the surrounding circumstances and each case will be peculiar to itself. And in determining such questions of fact and weighing the evidence we must remember that as the business is done, the ordinary local agent and other representatives of the companies are allowed the widest powers in practice and as a matter of fact are constantly giving unwritten waivers which the companies sanction or wink at without objection. [22]

What then is our conclusion as to these two agency provisions in the New York Standard Form Fire Insurance Policy?

(22) Richards on Insurance (3rd Ed.) page 205, says: "The regular local or commissioned agents of fire insurance companies are said to be general agents, and except as restrictions upon their authority are inserted in the application or policy, or otherwise made known to the insured, they are held to have power to waive conditions and forfeitures, and to estop the company, without written permit. This conclusion is based largely upon the extent of their actual authority, which embraces such acts as accepting or rejecting proposals, countersigning, delivering, canceling, renewing policies, giving written permits, and fixing rates of premiums."

It simply amounts to this, that you cannot change an unalterable fact by a clause or condition put into a written instrument. [23] If the sky is blue you cannot change its color by saying in a contract that it shall not be deemed to be blue. And likewise if you put out a local agent with full authority to issue policies and agree upon the terms of the insurance you cannot alter the fact that you have given him such full powers merely by denying it in the policies which he writes. As Mr. George Richards says in his book, these clauses are not illegal and are all right if not untrue. He might well have added that where they are untrue they are of no effect. In thus practically nullifying these clauses of the policy the courts and juries have not applied any new doctrines of law nor have they discriminated against the insurance companies. They have applied the same rules that are applied to other contracts and have determined the facts in the light of the evidence produced before them.

In closing this address I wish to thank you gentlemen of the Insurance Society for giving me this opportunity to address you upon these agency sections of the policy which have caused too many misunderstandings, and some most unnecessary friction between the insurance companies and their policy holders. If this address shall help, even in the slightest degree, to remove or lessen any of these misunderstandings and friction between companies and policy holders, I shall feel well repaid for my efforts.

(23) STERNAMAN v. MET. LIFE INS. CO. (1902) 170 N. Y. 13, involved the clause in a Life Insurance policy providing that the examining physician should be deemed the agent of the assured. In holding that the physician was in fact the agent of the company in spite of that clause, VANN, J. said at page 19: "The power to contract is not unlimited while as a general rule there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy and by the nature of things. Parties cannot make a contract in violation of law or of public policy. They cannot by agreement change the laws of nature, or of logic, or create relations physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract."

PRINTED MARCH, 1916

20422

END OF
TITLE